

**Dai-Ichi Electronics (M) Sdn Bhd v
Tenaga Nasional Bhd**

HIGH COURT (PENANG) — CIVIL SUIT NO 22-198-95
VINCENT NG J
15 FEBRUARY 1996

Civil Procedure — *Injunction* — *Interlocutory injunction to restrain TNB from cutting off power supply and to restrain TNB from enforcing bank guarantee — Whether there were serious questions to be tried — Whether the balance of convenience lay in favour of the plaintiff — Whether the court can impose any extraneous conditions when granting an interlocutory injunction*

Public Utilities — *Electricity* — *Disconnection of electricity supply — Whether TNB has power to disconnect power upon giving 24 hours' notice — Whether the power to disconnect supply should be dependent on court proceedings — Electricity Supply Act 1990 ss 37(1), (3), 38(1) & (5)*

Words and Phrases — *'In his opinion'* — *Electricity Supply Act 1990 s 38(1)*

Words and Phrases — *'Proves that an offence has been committed'* — *Electricity Supply Act 1990 s 38(1)*

Upon an alleged discovery that the blue power supply wire and the circuit board seal in the plaintiff's factory had been tampered with, the defendant ('TNB') issued and forwarded to the plaintiff a special bill dated 15 March 1995 for the sum of RM247,943.27 and a 'bil rampai' (supplementary bill) dated 16 March 1995 for the sum of RM2,000 ('the two bills'). TNB also threatened to cut off the supply of electricity to the plaintiff's factory. This compelled the plaintiff to make 10% payment on the two bills and to arrange for a bank guarantee for RM223,148.94 to cover the balance amount in the two bills. The plaintiff thereafter instituted a suit against TNB. Pending the trial of the suit, the plaintiff obtained two interim injunctions ex parte. The present matter before the court was an inter partes application by the plaintiff which prayed for interlocutory injunctions: (a) that TNB be restrained from disconnecting the electrical supply to the plaintiff's factory; and (b) that TNB be restrained from demanding the instalment payments on the two bills or to enforce the bank guarantee which was issued by the plaintiff to the defendant on 20 March 1995. Counsel for the plaintiff submitted that there was a serious dispute of fact in this case. However, TNB contended that that they were entitled to issue the two bills and to disconnect the supply of electricity to the plaintiff's factory under s 38(1) of the Electricity Supply Act 1990 ('the Act').

Held, allowing the plaintiff's application:

- (1) Though s 38(1) of the Act ex facie appears to allow TNB to disconnect power upon giving 24 hours' notice, it is doubted whether the legislature intended to endow 'any person employed

- A by' TNB such drastic and decisive power. Section 38(1) should be read in conjunction with s 38(3) and the phrase 'which in his opinion' cannot be interpreted in isolation from other words in s 38 and other provisions of the Act. The words 'proves that an offence has been committed under s 37(1), (3) and (14)' following the words 'in his opinion' in s 38(1), when read in the light of s 38(3), would indicate that disconnection followed by reconnection of electrical supply are the approved steps that can be carried out by TNB only after the consumer is proved by evidence in the court of law to have committed an offence under s 37(1), (3) or (14). The word 'proves' appearing in s 38(1) envisages proof before a court of law and not before an employee of TNB. Therefore the power envisaged in s 38(1) should be dependent, as its sole basis, on the outcome of court proceedings under ss 37 and 38(5) of the Act (see pp 511H-I, 512A-B).
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- D (2) It should be remembered that the legislature had already placed sufficient protection for TNB in the form of civil and criminal remedies under ss 37 and 38(5) of the Act (see p 512D-F, I).
- E (3) The fact that TNB finally conceded to the granting of the interlocutory injunction to restrain itself from disconnecting the electricity supply to the plaintiff's factory clearly showed that there were serious questions to be tried and that the balance of convenience lay in favour of the plaintiff (see p 513E).
- F (4) When granting an interlocutory injunction, neither the court nor the parties can impose any extraneous condition other than the condition as to damages; unless of course both parties agree to such extraneous conditions. However, in cases where a plaintiff is resident out of the jurisdiction of the court and it is shown that the plaintiff has no assets within the jurisdiction then the court may order fortification of the undertaking. In the present case, as it had not been contended that the plaintiff had no assets within the court's jurisdiction, the bank guarantee of RM223,148.94 should not remain (see p 514F-I).
- G (5) The defendant should thus be restrained from disconnecting the supply of electricity to the plaintiff's factory and from demanding instalment payments on the two bills (see p 514C).

Obiter:

- H Even if s 38(1) of the Act ought to be taken in isolation, pending evidential proof of the commission of an offence under s 37 in a criminal or civil court, an interlocutory injunction against disconnection of power supply ought to be readily granted so as not to deter or cause a withdrawal of large investors from this country (see p 512B-C).
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[Bahasa Malaysia summary]

Setelah mendapati bahawa wayar biru untuk bekalan kuasa dan penutup papan litar di kilang plaintif telah diusik, defendan ('TNB')

pun mengisui dan menyampaikan kepada plaintif satu bil khas bertarikh 15 Mac 1995 untuk jumlah RM247,943.27 dan satu bil rampai bertarikh 16 Mac 1995 untuk jumlah RM2,000 ('dua bil itu'). TNB juga mengugut untuk memotong bekalan elektrik ke kilang plaintif. Ini mendesak plaintif membuat pembayaran sebanyak 10% ke atas dua bil itu dan mengatitkan satu gerenti bank sebanyak RM223,148.94 untuk menjamin jumlah baki dalam dua bil itu. Plaintif kemudiannya memfailkan satu guaman terhadap TNB. Sementara menantikan perbicaraan guaman itu, plaintif telah memperolehi dua injuksi sementara secara *ex parte*. Perkara di depan mahkamah sekarang adalah satu permohonan *inter partes* oleh plaintif yang memohon untuk injuksi *interlokutori*: (a) supaya TNB disekat daripada memberhentikan bekalan elektrik ke kilang plaintif; dan (b) supaya TNB disekat daripada menuntut bayaran ansuran ke atas dua bil itu atau menguatkuasakan gerenti bank yang diisui oleh plaintif kepada defendan pada 20 Mac 1995. Peguam untuk plaintif berhujah bahawa terdapat pertikaian fakta yang serius di dalam kes ini. Walau bagaimanapun, TNB menegaskan bahawa mereka berhak mengisui dua bil itu dan memberhentikan bekalan tenaga elektrik ke kilang plaintif di bawah s 38(1) Akta Bekalan Elektrik 1990 ('Akta itu').

Diputuskan, membenarkan permohonan plaintif:

- (1) Walaupun s 38(1) Akta itu *ex facie* kelihatan membenarkan TNB memotong bekalan elektrik setelah memberi notis 24 jam, ianya diragui sama ada badan perundangan berniat memberikan kepada 'mana-mana orang yang digaji oleh' TNB kuasa yang begitu mendadak dan muktamad. Seksyen 38(1) sepatutnya dibaca bersama dengan s 38(3) dan frasa 'yang dalam pendapatnya' tidak boleh ditafsirkan berasingan daripada perkataan lain dalam s 38 dan lain-lain peruntukan dalam Akta itu. Perkataan 'membuktikan bahawa kesalahan telah dilakukan di bawah s 37(1), (3) dan (14)' yang mengikuti perkataan 'dalam pendapatnya' dalam s 38(1), bila dibaca dengan s 38(3), akan menunjukkan bahawa pemberhentian yang diikuti oleh penyambungan semula bekalan elektrik adalah langkah-langkah yang dipersetujui boleh dijalankan oleh TNB hanya selepas pengguna itu dibuktikan dengan keterangan dalam mahkamah undang-undang telah melakukan kesalahan di bawah s 37(1), (3) atau (14). Perkataan 'membuktikan' di dalam s 38(1) membayangkan pembuktian di depan mahkamah undang-undang dan bukannya di depan seorang pekerja TNB. Oleh itu kuasa yang dibayangkan di dalam s 38(1) sepatutnya bergantung, sebagai asas tunggalnya, kepada keputusan prosiding mahkamah di bawah ss 37 dan 38(5) Akta itu (lihat ms 511H-I, 512A-B).
- (2) Perlu diambil ingat bahawa badan perundangan telah meletakkan perlindungan yang secukupnya untuk TNB dalam bentuk remedi sivil dan jenayah di bawah ss 37 and 38(5) of the Act (lihat ms 512D-F, I).

- A (3) Hakikat bahawa TNB akhirnya bersetuju kepada pemberian injunksi interlokutori untuk menyekat dirinya daripada memberhentikan bekalan elektrik ke kilang plaintif dengan jelasnya menunjukkan bahawa terdapat persoalan serius yang perlu dibicarakan dan bahawa imbalan kesenangan berada pada pihak plaintif (lihat ms 513E).
- B (4) Apabila memberikan satu injunksi interlokutori, baik mahkamah mahupun pihak-pihak yang berkenaan boleh mengenakan apa-apa syarat yang lain selain daripada syarat-syarat tentang ganti rugi; melainkan kedua-dua pihak bersetuju kepada syarat-syarat yang lain itu. Walau bagaimanapun, dalam kes di mana plaintif bermastautin di luar bidang kuasa mahkamah dan ia ditunjukkan bahawa plaintif tidak mempunyai aset dalam bidang kuasa mahkamah maka mahkamah boleh membuat perintah untuk menguatkan lagi sesuatu akujanji. Dalam kes ini, oleh kerana tidak dihujah bahawa plaintif tidak mempunyai aset dalam bidang kuasa mahkamah, gerenti bank sebanyak RM223,148.94 tidak patut dikekalkan (lihat ms 513F-I).
- D (5) Defendan dengan itu harus disekat daripada memutuskan bekalan elektrik ke kilang plaintif dan daripada menuntut bayaran ansuran atas dua bil itu (lihat ms 514C).

E **Obiter:**

Biarpun s 38(1) Akta itu patut ditafsirkan berasingan, sementara menantikan bukti perlakuan satu kesalahan di bawah s 37 di dalam satu mahkamah jenayah atau sivil, satu injunksi interlokutori terhadap pemberhentian bekalan kuasa patut diberikan supaya tidak menghalang atau menyebabkan satu pengunduran pelabur besar daripada negara ini (lihat ms 512B-C).]

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Notes

For cases on application of interlocutory injunctions, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1613-1615.

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For cases on supply of electricity, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1610-1611.

Cases referred to

H

Ace King Pte Ltd v Circus Americano Ltd & Ors [1985] 2 MLJ 75
Allen v Jambo Holdings Ltd [1980] 1 WLR 1252
Ashtiani & Anor v Kashi [1986] 3 WLR 647
Third Chandris Shipping Corp v Unimarine SA [1979] 1 QB 645
Z Ltd v A [1982] 1 All ER 556

I

Legislation referred to

Electricity Supply Act 1990 ss 37(1), (3), (14), 38(1), (3), (5)

Mureli Navaratnam (Jeyasingam with him) (Ghazi & Lim) for the plaintiff.
Ahmad Shukor (Jahara Radzi & May Chan) for the defendant.

Vincent Ng J: The plaintiff company ('the plaintiff'), a large multinational company, had filed a claim under this suit (encl 1) against the defendant corporation ('TNB') — a considerably larger publicly subscribed national corporation — which, *inter alia*, prayed:

- (a) for a declaration that TNB is not entitled to issue and/or demand on the special bill No 6001-1501-02 and 'bil rampai' No 060743 which were sent by TNB to the plaintiff for the period from May 1993 to February 1995;
- (b) that TNB whether by themselves or by their directors, their servants, agents or otherwise howsoever be restrained by an interlocutory injunction from disconnecting the electricity supply at Lot 37, Jalan 6, Bakar Arang Industrial Estate, 08000 Sungai Petani, Kedah Darul Aman pursuant to special bill No 6001-1501-02 and 'bil rampai' No 060743 issued for the period from May 1993 to February 1995 until the hearing of this legal action or until a further order is made; and
- (c) that TNB whether by themselves or by their directors, their servants, agents or otherwise howsoever be restrained by an interlocutory injunction from demanding the instalment payments on the special bill and the 'bil rampai' or to enforce the bank guarantee which was issued by the plaintiff to TNB on 20 March 1995, until the hearing of this suit or until such further order is made.

In tandem with the institution of this writ, the plaintiff had initially applied *ex parte* for and was granted the interim injunctions, by way of a summons in chambers dated 3 August 1995 (encl 3) supported by the affidavit of Tai Teik Hock, affirmed on 31 July 1995 (encl 2), which, upon their expiry, was closely followed by an *inter partes* application by summons in chambers dated 22 August 1995 (encl 7), for two interlocutory injunctions *vide* prayers (a) and (b) of encl 7, the terms of which are similar to the aforesaid prayers (b) and (c) of their statement of claim (encl 1). Enclosure 7, the current *inter partes* application now before me for hearing, is opposed by TNB, through the affidavit of its senior manager En Azhari bin Mohd Pilus affirmed on 14 October 1995 (encl 19).

The crux of the battle between the parties here, stems from the issue by TNB of a special bill for the sum of RM247,943.27 dated 15 March 1995 followed by a 'bil rampai' (supplementary bill) for the sum of RM2,000 dated 16 March 1995 ('the two bills'), and the circumstances surrounding the issuance of these two bills.

The two bills arose out of TNB's alleged discovery that the blue power supply wire and the circuit board seal in the plaintiff's factory had been tampered with, which led to TNB forwarding the said two bills to the said plaintiff and threatening to cut off the power supply to their factory. The plaintiff contended that as they ran a major electronic factory in Sg Petani, Kedah which was totally dependent on uninterrupted electrical power supply they felt compelled as a matter of urgent necessity to make 10% payment on the two bills and to arrange for a bank guarantee for RM223,148.94 to cover the balance amount in the two bills.

A Counsel for the plaintiff, Mr Mureli submitted that there is a serious
dispute of fact in the case, as the plaintiff contends that the circuit board
seal was neither broken nor tampered with, and if it was not broken the
blue wire could not be tampered with. To this, TNB countered (in para 12
B that the blue wire can be tampered with even without breaking the seal. In
this regard, it is noted that TNB had not challenged the plaintiff's assertion
in para 11 of encl 2 that the seal had not been tampered with and was in
good condition. The plaintiff further said that there was not a shred of
evidence as to how this special bill and supplementary bill were arrived at
and how the power units were calculated, bearing in mind that the check
C visit by TNB's employee was done only some time in February 1995
whereas the special bill was backdated to 19 May 1993. Thus, according
to them, the backdating and the number of power units allegedly stolen
was based on pure guesswork. In conclusion, it was submitted on the
plaintiff's behalf that as TNB had conceded that there are serious disputes
D of fact to be tried, the status quo ought to be maintained until the trial of
the matter, in the interest of justice. It was further urged upon this court
that the whole effect of the complete shut-off of power supply would be
devastating, as it would not only cause — to borrow a more descriptive
language currently familiar with consumers of TNB power supply — a
blackout, but a complete shut down of manufacturing operations, resulting
E in phenomenal damage and loss to the plaintiff, whereas to TNB it was
purely a question of a monetary claim as no police report had been lodged
against the plaintiff.

TNB had contended that they are entitled to issue the two bills and
indeed to disconnect the supply of electrical energy to the plaintiff's
F factory by virtue of the clear provision in s 38(1) of the Electricity Supply
Act 1990 ('the Act').

Section 38(1) of the Act states as follows:

- (1) Where any person employed by a licensee finds upon any premises
evidence which in his opinion *proves that an offence has been committed*
G under s 37(1), (3) or (14), the licensee or any person duly authorized by
the licensee may, upon giving not less than 24 hours' notice, in such
form as may be prescribed, cause the supply of energy to be disconnected
from the said premises.

Though this provision *ex facie* appears to allow TNB to disconnect power
upon giving 24 hours' notice, yet I doubt whether it is intended by the
H legislature to endow 'any person employed by' TNB such drastic and
decisive power. In my view, s 38(1) should not be construed in isolation but
rather, in conjunction with s 38(3) which allows TNB to require the
consumer to pay them loss of revenue and expenses 'incurred in respect of
reconnection of electricity supply' due to 'the offence committed under
I s 37(1), (3) and (14)'. It is axiomatic that reconnection does not come into
play unless and until disconnection has taken place. Thus, in my considered
view, the expression 'which in his opinion' occurring in s 38(1) cannot be
interpreted in isolation from the other words in the same section and other
provisions in the Act. Consequently, the words 'proves that an offence has

been committed under s 37(1), (3) and (14)' following the words 'in his opinion' in s 38(1), when read in the light of s 38(3), would indicate that disconnection followed by reconnection of electrical supply are the approved steps that can be carried out by TNB only after the consumer is proved by evidence in the court of law to have committed an offence under s 37(1), (3) or (14). This is especially so as s 37(1), (3) and (14) all talk of offences resulting in conviction. Surely, the word 'proves' appearing in s 38(1) envisages proof before a court of law and not before an employee of TNB.

Though there may exist some rogue elements among large foreign and local manufacturing entities here, who steal TNB power, as alleged by their counsel, yet it cannot be the intention of Parliament to deter or cause a withdrawal of large investors such as the plaintiff in the instant case by giving such drastic and decisive right to a supplier of power on a monopoly basis to cut off power, based on special bills, founded on estimates (unproven particularly at this stage), suspicion and opinion. This is all the more so, as apparently under s 38(1) 'any person employed by the licensee (TNB)' could make a decision based on 'his opinion' to disconnect electrical power after issuing 24 hours' notice under s 38(1), and thereby, in effect, to shut down the factory operation itself. Hence, I am of the view that such drastic power to shut down a factory's operations as envisaged in s 38(1) should be dependent, as its sole basis, on the outcome of court proceedings under ss 37 and 38(5) of the Act. But even if I am wrong and s 38(1) ought to be taken in isolation, yet I am of the considered view, that pending evidential proof of the commission of an offence under s 37 in a criminal or civil court, an interlocutory injunction against disconnection of power supply ought to be granted readily, for the cogent reasons adumbrated herein. Be it noted that unlike in the past, TNB just like Syarikat Telekom Malaysia are not only service orientated corporations but, quite rightly since their privatization, also profit orientated concerns as they would have to cater to the expectation of their shareholders. The logical implications of this would be that both such corporations would have to take their place like any other company under the Malaysian sun.

Not to allow the injunction prayed for would be tantamount to the court giving a 'person employed by' TNB, licence to impose on a consumer, a 'special bill' for power supply upon his mere 'opinion' of tampering, and then to disconnect power for non-satisfaction of such special bill, however exorbitant. Indeed, to convey the impression that the court lacks either jurisdiction or the correct approach to intervene in favour of the plaintiff at this stage of the proceedings, would be to undermine the confidence of foreign investors in the state and country; with this sword of Damocles perpetually hanging over their heads, potential investors in this state or country would rather go elsewhere.

It is trite that, in construing statutory provisions the courts ought to presume the salutary intention of Parliament for the nation it serves; and Parliament in its ascribed wisdom, is incapable of undermining the better interests of the public or community. We ought to be mindful that the legislature has already put in place in favour of TNB, sufficient protection in the form of civil and criminal remedies under ss 37 and 38(5) of the Act. On criminal liability, s 37(1) provides:

- A Any person who tampers with or adjusts any installation or part thereof ... shall be guilty of an offence and for each such offence shall, on conviction, be liable to a fine not exceeding RM100,000 or to imprisonment for a term not exceeding five years or to both.

And, s 37(3) provides:

- B Any person who in any manner dishonestly —
- (a) abstracts energy;
 - (b) consumes energy;
 - (c) uses energy;
 - (d) alters the index of any meter or other instrument used on or in ... any licensed installation for recording the output or consumption of energy;
- C or
- (e) prevents any such meter or instrument from duly recording the output or consumption of energy,
- shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding RM100,000 or to imprisonment for a term not exceeding three years or to both.

- D On civil liability, s 38(5) states:

The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

- E The other important legal point for this court to bear in mind is the very fact that TNB has eventually (after several requests for adjournment) conceded (though subject to the maintenance of the bank guarantee) to the granting of the interlocutory injunction in prayer (a) of encl 7 to the plaintiff and this would go to show that there are serious questions to be tried and that the balance of convenience lay in favour of the plaintiff. It is this court's considered view that save in exceptional circumstances and in cases of mareva injunctions, the court cannot impose — and neither can the parties demand the imposition of — any extraneous condition when granting an interlocutory injunction other than the condition as to damages; unless of course both parties agree to such extraneous conditions. However,
- G in cases of mareva injunctions where it is shown, especially at the inter partes hearing, that the plaintiff's undertaking in damages is actually worthless (see *Ashtiani & Anor v Kashi* [1986] 3 WLR 647 per Dillon LJ at p 659, and *Allen v Jambo Holdings Ltd* [1980] 1 WLR 1252 (CA)), the court can order a fortification of the plaintiff's undertaking as to damages by requiring a bond or other security in support thereof. (See *Z Ltd v A* [1982] 1 All ER 556 at p 564 and *Third Chandris Shipping Corp v Unimarine SA* [1979] 1 QB 645 at p 669.) Also, in cases where the plaintiff is resident out of the jurisdiction of the court and it is shown that the plaintiff has no assets within jurisdiction then the court may order fortification of the undertaking. (See *Ace King Pte Ltd v Circus Americano Ltd & Ors* [1985] 2 MLJ 75.) Thus, as it has not been contended that the plaintiff has no assets within the court's jurisdiction, I would accept the plaintiff's contention that for this court to require that the bank guarantee of RM223,148.94 earlier given should remain, would be tantamount to not granting any interlocutory injunction at all.

TNB may not see the supreme irony in the fact that this temporary injunction to restrain them may indeed have the effect of shielding them from self-inflicted liability for damages, which could be astronomical, in the event that the plaintiffs are forced to shut down due to total cut-off of power, and, either TNB find themselves unable to prove their allegations of tempering or the court should hold that the drastic measure of power cut-off is unauthorized by the law until the power consumer has been convicted of an offence under s 37 of the Act. Be it noted that until the hearing of this encl 7, TNB had neither lodged any police report nor initiated criminal proceedings against the plaintiff.

For all the above reasons, I would allow the plaintiff's application in terms of prayer (b) of encl 7 (see prayer (c) of encl 1). And prayer (a) thereof is by consent also allowed. Costs shall be in the cause.

Application allowed.

Reported by Izzaty Izzuddin

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